

**Laboratory Corporation of America Holdings and  
Service Employees International Union, AFL–  
CIO, Local 339.** Case 4–CA–26254

February 13, 2001

**DECISION AND ORDER**

**BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN  
AND WALSH**

On April 14, 1998, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief, and the General Counsel filed cross-exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified, and to adopt the recommended Order as modified<sup>2</sup> and set forth in full below.

The judge dismissed allegations that the Respondent's executive vice president, Richard Novak, unlawfully solicited grievances and promised benefits during a meeting with employee Anne DeFeo.<sup>3</sup> The judge reasoned that the "meeting [with DeFeo] was a benign and typical visit by a new high level manager" and Novak's statements were "too ambiguous to constitute a violation of the Act." We find merit in the General Counsel's exceptions to these findings.<sup>4</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We have modified the judge's recommended Order to require the Respondent to post the notice to employees at all its facilities within the Pleasantville, New Jersey region, which were the subject of the Union's organizational campaign.

In his remedy section, the judge stated that he would not order the Respondent to reopen the Linwood, New Jersey facility where discriminatee Anne DeFeo had been assigned. The judge reasoned that the discrimination against DeFeo would be fully remedied by requiring the Respondent to offer her a substantially equivalent position in a nearby facility. In his recommended Order, however, the judge required the Respondent to offer DeFeo reinstatement "to her former job." We shall modify the judge's recommended Order accordingly.

<sup>3</sup> The judge correctly found that during the same meeting Novak violated Sec. 8(a)(1) by granting DeFeo the benefit of an increased lunchbreak.

<sup>4</sup> We find it unnecessary to pass on the General Counsel's exceptions concerning whether the Respondent violated Sec. 8(a)(1) by granting a wage increase to Pleasantville region employees during late March and early April 1997, and by soliciting grievances and promising and grant-

On March 31, 1997,<sup>5</sup> Respondent's operations manager, Harry Bush, and Executive Vice President Richard Novak visited the Linwood port where DeFeo worked alone. Novak had been hired by the Respondent approximately 6 weeks earlier. DeFeo testified that, during the course of this meeting, Novak told her he was there just "to find out why I was unhappy and everybody else and see if he [Novak] couldn't help change things." DeFeo told Novak, *inter alia*, that she would like to have a longer lunchbreak. She also informed him that the block on long distance calls from her telephone was preventing her from exchanging necessary information with doctors. Novak agreed to the longer lunch period, said he would look into the long distance block, gave DeFeo his home phone number and toll-free office number, and told her to "call him at any time, day or night, with any problem and he would fix it."

The Respondent failed to prove that before the union campaign began, the Respondent had a practice of holding either group or individual meetings to solicit grievances by managers. Indeed, DeFeo testified that she had not been visited at her patient service center by either Novak or Bush before March 31.

The relevant principles are well established. They were recently summarized in *Maple Grove Health Care Center*, 330 NLRB 775 (2000), as follows:

Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one.

Here, the inference that Novak was promising to remedy DeFeo's grievances has not been rebutted. Contrary to the judge's finding, there is nothing ambiguous about Novak's statements. Novak asked DeFeo what changes could be made to make her and other employees happy. This inquiry, in fact, elicited from DeFeo complaints about the

ing benefits to employees on April 22, 1997. The finding of such additional violations would be cumulative and would not affect the remedy.

<sup>5</sup> All dates hereafter are in 1997, unless otherwise specified.

lunchbreak and the blocking of long distance calls. Novak immediately resolved one complaint, promised to look into another complaint, and gave DeFeo his personal phone numbers with the request that DeFeo call him "with any problem and he would fix it." We find that Novak solicited grievances from DeFeo, promptly resolved one of her grievances, and explicitly promised to "fix" others.

"Nor does the fact that [Novak] was a new [manager] insulate [the Respondent] from the Board's findings that the [Respondent's] . . . promises of benefits to its employees violated the Act." *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 853 (D.C. Cir. 1984). This is particularly true here where the record shows that Novak actually remedied one of DeFeo's grievances. See *Blue Grass Industries*, 287 NLRB 274 fn. 4, 286 (1987) (inference of promise of benefit arising from grievance solicitation not rebutted by fact that manager was newly appointed; in fact, respondent "actually corrected some grievances identified by employees").

Accordingly, for all these reasons, we find that the Respondent violated Section 8(a)(1) by soliciting grievances and promising to remedy them.

#### ORDER

The National Labor Relations Board orders that the Respondent, Laboratory Corporation of America Holdings, Linwood, New Jersey, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Threatening employees with unspecified reprisals in order to discourage their union activities.

(b) Granting benefits to employees in order to discourage their union activities.

(c) Soliciting grievances from and promising benefits to employees in order to discourage their union activities.

(d) Closing a facility, discharging, failing to rehire, or otherwise discriminating against employees because they engage in union or other concerted activity protected by the National Labor Relations Act.

(e) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Anne DeFeo full reinstatement to a substantially equivalent position in the immediate area of the Linwood, New Jersey facility, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Anne DeFeo whole for any loss of earnings and other benefits she may have suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and failure to rehire, and within 3 days thereafter notify Anne DeFeo in writing that this has been done and that these actions will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the Pleasantville, New Jersey region copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 18, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with unspecified reprisals in order to discourage their union activities.

WE WILL NOT grant benefits to our employees in order to discourage their union activities.

WE WILL NOT solicit grievances from and promise benefits to our employees in order to discourage their union activities.

WE WILL NOT close a facility, discharge, fail to rehire, or otherwise discriminate against our employees because they engage in union or other concerted activity protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Anne DeFeo full reinstatement to a substantially equivalent position in the immediate area of the Linwood, New Jersey facility, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Anne DeFeo whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of and failure to rehire Anne DeFeo and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that these actions will not be used against her in any way.

#### LABORATORY CORPORATION OF AMERICA HOLDINGS

*Mark E. Arbesfeld and Allyson C. Hall, Esqs.*, for the General Counsel.

*John G. Creech and Erin E. Swann, Esqs.*, of Greenville, South Carolina, for the Respondent.

#### DECISION

#### STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Philadelphia, Pennsylvania, on February 9 and 10, 1998, upon the General Counsel's complaint which alleged that the Respondent terminated employee Anne DeFeo in violation of Section 8(a)(3) of the National Labor Relations Act. Certain violations of Section 8(a)(1) were also alleged. The Respondent generally denied that it committed any violations of the Act, and contends that paragraphs 5 and 6(c) should be dismissed as being unrelated to the allegations in any charge.

On the record as a whole,<sup>1</sup> including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended Order.

#### I. JURISDICTION

The Respondent is a Delaware corporation, engaged in the business of operating clinical laboratory testing facilities throughout the United States, including those involved here at Linwood and Pleasantville, New Jersey. In the course and conduct of this business, the Respondent annually derives gross revenues in excess of \$500,000 and purchases goods valued in excess of \$50,000 directly from points outside the state of New Jersey. The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), 2(6), and 2(7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Service Employees International Union, AFL-CIO, Local 339 (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. The Facts

The Respondent was created in 1995 with the merger of two corporations engaged in clinical diagnostic laboratory services. It operates patient service centers (sometimes referred to as "ports") throughout the United States and has about 18,000 employees. Material to this case is the Respondent's Pleasantville, New Jersey region, which has 12 ports and is part of the Northeast Division (New Jersey, New York, Eastern Pennsylvania, and all the New England states).

Anne DeFeo worked for the Respondent (or a predecessor) from 1992 until July 1997 as a phlebotomist or a data-entry clerk. She was first assigned to the Pleasantville port, but over time was assigned to five different ports in the Pleasantville region, including her last assignment at Linwood, New Jersey, where she had been previously assigned.

In February 1997, the Union began an organizational campaign among the Respondent's employees in the Pleasantville Region. DeFeo was active in the campaign, and just before a scheduled meeting of all Pleasantville employees with various members of management, she obtained the signatures of employees on a petition seeking union representation which she attempted to hand to Robert Elder, senior vice president, human resources. Elder refused to take the petition and told DeFeo that she "could get in a lot of trouble." As Elder started the meeting, DeFeo stood and stated she was from the Union and had a petition seeking recognition. Elder told her to sit down.

During the months preceding the election, management officials held additional group meetings and also met individually with employees. Thus on March 31, Harry Bush (operations manager in Pleasantville) and Richard Novak (executive vice president, Eastern operations) came to the Linwood port to talk

<sup>1</sup> Counsel for the General Counsel moved to make certain corrections to the transcript, which changes appear warranted. The motion is granted and the list of corrections is added to the record as GC Exh. 44.

with DeFeo. Bush introduced her to Novak. She said she felt intimidated and would “like to be represented, have another one of my co-workers with me.” This request was refused. She was told that the meeting was just “to find out why I was unhappy and everybody else and see if he (Novak) couldn’t help change things.”

DeFeo said she would like to have a longer lunchbreak. Novak replied that would not be a problem. And she also said that the long distance freeze on the telephone was inconvenient. And they talked a bit about raises. At the end of the meeting, Novak gave her a card with his home phone number, as well as the Respondent’s 800 number and Novak’s extension, and he told DeFeo “I could call him at any time, day or night, with any problem and he would fix it.”

After this, she was allowed to combine her two 15-minute breaks with the normal one-half hour for lunch and thus take an hour lunchbreak. This was subsequently reduced to 50 minutes by Bush.

In early April, DeFeo received a 49-cent raise from \$10.49 per hour to \$10.98. This was announced by Bush and Mary Shinick, director of human resources, Northeast division. DeFeo was told that the raise was to be effective on her anniversary date of April 3 and was to “to bring me up to standard.”

Another mandatory meeting of employees was held by Novak on April 22 (3 days prior to the scheduled representation election) at which Novak told them “that he was new in the company, that he had heard all our complaints and he was really sorry that we were so unhappy and that he was going to change everything he could to make us unhappy.” He asked the employees for another chance and that “he would take care of all our problems.”

After the meeting DeFeo and another employee approached Novak with a complaint about Bush having made two permanent weekend position whereas before the work was done on a volunteer basis, which allowed employees to work some overtime. Novak told Bush to reinstate the volunteer system.

The election was held on April 25. A substantial majority of the employees voted against representation by the Union.

Then on June 20, DeFeo was visited by Bush and Dave Rosi (operations manager for Marlton, New Jersey) and was told that the Respondent had decided to close the Linwood port and she would be laid off. When DeFeo asked why she would not be reassigned to another port, Bush said that she was “attached” to the Linwood port. At the time the Respondent had job openings in the Pleasantville branch for which DeFeo was admittedly qualified, as well as numerous jobs out of other branches in the Northeast.

## *B. Analysis and Concluding Findings*

### *1. The 8(a)(1) allegations*

#### *a. Threat by Robert Elder*

It is alleged, and denied, that on March 13 (amended to March 18), Robert Elder, senior vice president of human resources, threatened an employee with unspecified reprisals. This is alleged to have taken place just before a meeting of employees when DeFeo attempted to give Elder a petition to the effect that the employees wanted representation by the Un-

ion. DeFeo testified that Elder declined to take the petition, saying to do so would be “inappropriate” and, according to DeFeo, “he told me that if I did this, I could get into a lot of trouble.”

Elder admitted that DeFeo attempted to give him “a document” and that he refused saying, “I don’t think that’s appropriate. I will not accept it.” Elder specifically denied that he said “to her that you can get into a lot of trouble. That’s not the proper thing to do.” Elder further testified that he did not know what the document was, that identifying it “would be speculative on my part.”

I do not believe the import of Elder’s testimony. While his answers may be literally true, I discredit his suggestion that he had no idea that DeFeo was attempting to hand him a petition for union representation. Indeed, the meeting was in response to the organizational campaign. I further discredit Elder’s testimony that he did not tell DeFeo she “could get into a lot of trouble.”

I found DeFeo a generally credible witness. Further, her testimony about this event is consistent with her testimony about subsequent matters, and Elder’s threat fits the Respondent’s pattern of actions which cumulated in DeFeo’s discharge. I therefore conclude that on March 18 the Respondent did threaten an employee with unspecified reprisals for engaging in union activity in violation of Section 8(a)(1) of the Act.

The Respondent argues that this allegation is unrelated to any allegation in the charge or its amendments and therefore should be dismissed. Although the charge dealt with only the discharge of DeFeo, the second amended charge alleges other acts designed to discourage employees from supporting the Union. Since the threat by Elder is within the context of the Respondent’s overall campaign against the Union, I conclude that it is closely related to the allegations in the charge as amended. *Well-Bred Loaf* 303 NLRB 1016 fn. 1 (1991), and cases cited therein.

#### *b. Solicitation, promise, and grant of benefits by Rick Novak*

When Novak and Bush visited DeFeo at the Linwood facility on March 31 it is alleged that Novak (1) solicited complaints and grievances and promised to increase benefits if employees would refrain from supporting the Union; (2) promised an employee everything would be better in order to discourage union activity; and (3) granted the benefit of allowing an employee to close the Linwood center at lunchtime in order to discourage support for the Union.

At the time Novak and Bush visited DeFeo at the Linwood facility, Novak had been on the job only a few weeks. He was traveling around with Bush and, as he typically did, stopped in to visit the patient service centers. His version of this meeting generally coincides with that of DeFeo. DeFeo testified that Novak asked what he could do to make employees happy, what changes he could make. She suggested that she would like a longer lunch hour in lieu of the one-half hour and breaks in the morning and afternoon, and she said that long distance calls were blocked which prevented her from communicating necessary information to doctors outside the local area.

Novak agreed that DeFeo could close the facility and take a 1-hour lunchbreak (subsequently cut to 50 minutes by Bush) and that they would look into the long distance block.

Although I conclude that this meeting occurred in substance as testified to by DeFeo, I also conclude that Novak did not solicit grievances or make promises of benefits in order to discourage union activity. This meeting was a benign and typical visit by a new high-level manager, which activity the Respondent was not required to cease just because the employees were attempting to organize. The alleged solicitation and promise of benefits was simply too ambiguous to constitute a violation of the Act.

However, by granting the benefit of an increased lunchbreak, occurring during the course of the campaign, was necessarily violative of Section 8(a)(1). *Airstream, Inc.*, 304 NLRB 151 (1991). I further conclude, that this allegation (par. 6(c) of the complaint) is closely related to the allegations in the amended charge.

#### *c. Granting wage increases to Pleasantville employees*

During late March, or early April, DeFeo, as well as other employees, received wage increases which they were told was to bring their wages up to "standard." In DeFeo's case this amounted to 49 cents per hour. While a wage increase during an organizational campaign is certainly suspect, such is not presumptively unlawful. *Holly Farms Corp.*, 311 NLRB 273 (1993). From the credited testimony of Mary Shinick, the director of human resources for the Northeast division, I conclude that the increase was in the planning stages well before any union activity and was occasioned by the fact that after the merger of two companies into the Respondent, there were wage discrepancies among employees doing the same job. Given the large number of employees of the Respondent, the wage adjustments were to be phased in over a 2-year period beginning in 1995. The increase DeFeo received would have been given when it was in the absence of any union activity.

Accordingly, I conclude that the Respondent did not violate Section 8(a)(1) as alleged in paragraph 7 of the complaint.

#### *d. Soliciting grievances, promises, and grants of benefits*

In paragraph 8 it is alleged that at a meeting of employees on April 22, a few days before the election, Novak solicited employee complaints and grievances, and promised them benefits and improved terms and conditions of employment. At the hearing this paragraph was amended to include an allegation that a benefit was granted in that the Respondent did not implement an announced change of after hours work being done by volunteers. This allegation is based on the following testimony of DeFeo:

Mr. Novak again said that he was new in the company, that he had heard all our complaints and he was really sorry that we were so unhappy and that he was going to change everything he could to make us unhappy. [Transcript error.]

He also had an overhead projector in the room with the union card up on the wall. It had a yes and a no, you know, in the little boxes. And the no was, of course, crossed out. And he kept referring to that saying this is not the way you want to go, to, you know, give us another chance.

And he ended it, he kept saying that he wanted us to be one big happy family and that he would take care of all our problems. And he ended it with, if we didn't like what was happening, we had to wait just another year and the Union could come back.

I find nothing in DeFeo's testimony amounting to solicitation of grievances, with and offer to remedy them, or the promise of benefits. At most, Novak sought to have employees vote against representation in the scheduled election by making a generalized appeal that if they did so, life would be better. In order to violate the Act in the manner alleged, an employer's solicitations and promises must be more specific. To find a violation on this testimony would be tantamount to concluding that an employer may not campaign against union representation.

Following Novak's speech, DeFeo and another employee approached him with a complaint that Bush was again going to change the way evening and weekend on-calls were handled, by creating two full-time positions rather than have the work be done by the regular employees on a volunteer basis. Novak asked Bush why the change and Bush replied that he had been so instructed by corporate, but as he could supply no name to Novak's satisfaction, Novak told him to leave the system as it was. By doing so the Respondent is alleged to have granted a benefit in violation of Section 8(a)(1).

Since nothing changed, it is difficult to conclude that a benefit was granted to employees in order to encourage their vote against the Union. I therefore, conclude that paragraph 8 be dismissed.

### **2. The discharge of Anne DeFeo**

In paragraph 9 of the complaint it is alleged that (a) the Respondent closed the Linwood facility and laid off DeFeo and (b) refused to rehire or recall her because of her activity on behalf of the Union.

The Respondent admits that DeFeo was informed on June 23 that the Linwood patient service center would close on July 3 and that her position would be eliminated. The Respondent contends this was a legitimate business decision having nothing to do with the union activity or DeFeo's participation therein. Secondly, the Respondent contends that its refusal to rehire her was based on its inviolate rules concerning applications for employment—that DeFeo had not filed out the proper form properly.

While the Respondent seems to deny that DeFeo was terminated, there can be little doubt that she was. When Bush and Rosi met with DeFeo on June 23 and told her that Linwood center would be closed, DeFeo asked where she would be going and Bush said that she was "attached" to the port and therefore, she would be given severance.

#### *a. Closure of the Linwood facility*

I conclude that the basic purpose to be served by closing the Linwood facility was the termination of DeFeo, the leading activist on behalf of the Union. According to Maria Graczyk, a former supervisor, early in the campaign Bush said he had learned that there would be a meeting of employees concerning the Union at DeFeo's house. Graczyk further testified that

Bush held many meetings of supervisors to discuss the progress of the union campaign and Bush “said on several occasions that he would get rid of” DeFeo. She testified that Rosi also said that “they’ll get rid of her.” I found Graczyk credible and had no apparent stake in the outcome of this matter. Neither Bush nor Rosi denied the statements attributed to them. I therefore conclude that management officials of the Respondent were predisposed to terminate DeFeo because of her union activity.

While there might be some economic justification for closing the Linwood facility, inasmuch as the Respondent had several one- or two-person patient service centers in the area, I conclude that Bush recommended Linwood specifically in order to terminate DeFeo.

DeFeo was a competent employee of 5 years. Had the closure of Linwood been solely for legitimate business reasons, more probably than not she would have been offered a position elsewhere. The Respondent had openings for on-call phlebotomists and data entry specimen processors at the Pleasantville facility, and had, for instance, 30 openings for phlebotomists in the Northeast. Of course DeFeo might not have wanted to transfer to another area, or take the on-call job, but she was not offered the chance. When she asked where she would be transferred to, Bush told her that she was “attached” to the Linwood facility and with its closure, she would be terminated.

The Respondent offered no evidence to support Bush’s assertion that employees are “attached” to a particular port such that in the event of the port’s closure they are terminated. To the contrary, DeFeo testified, without contradiction, that in her 5 years she was involuntarily transferred five times.

Bush’s statement to DeFeo was a total fabrication. There is absolutely no objective evidence that employees are “attached” to a particular port such that they cannot be reassigned absent filing an internal application. To the contrary, DeFeo was reassigned five times, as have been others. DeFeo was an experienced and competent employee. At the time the Linwood office was closed, there were jobs available out of Pleasantville and other branches in the Northeast. In the normal course of events, I conclude, had the closure been legitimate, the Respondent would have offered DeFeo transfer to an open position. Failure to do so indicates that the closure of Linwood was in retaliation for DeFeo’s union activity. This conclusion is supported by the Respondent’s sophistic argument that she could not be rehired because she failed to fill out the proper form in the proper manner.

I discredit Bush, and conclude that the story he told DeFeo upon her termination, which he repeated at the hearing, was a material misrepresentation of company policy. I conclude he deliberately sought to terminate her because of her active role on behalf of the Union.

The Respondent argues that Linwood was picked for closure because it had a low patient count and by closing Linwood it was able to renegotiate the lease, which was due to run until April 1999, and therefore save several thousand dollars. I reject this argument. First, the patient count was not shown to be substantially lower than others given the number of employees servicing the patients. Second, the Respondent’s action belies a serious intent to save money.

In May the lessor, Richard Steinberg, told Bush that a doctor in the office adjacent to the Linwood service center wanted to expand and Steinberg wanted to know whether the Respondent would be interested in relocating. On May 13 Steinberg wrote Bush to this effect.<sup>2</sup> The Respondent argues that based on this, the decision was made to close the Linwood facility and renegotiate the lease.

I conclude this is an after-the-fact argument, and did not play a part in the decision to close the Linwood facility. Steinberg’s letter of May 13 went unanswered. He wrote again on August 20, noting that the Linwood office had been vacated and again on October 20. It was not until December that the Respondent’s lease administrator got around to renegotiating with Steinberg. In short, the Respondent closed Linwood for purported economic reasons, yet paid full rent for 6 months. Such are not the actions of a business seeking to minimize expenses and I conclude that the argument that Linwood was closed for legitimate business reasons is bogus.

The office on Northfield-Zion Road was closed at about the same time; however, that office had fewer patients than Linwood and the lease for Zion Road was due to expire in July. On the other hand, Somers Point was not closed, though it had less than one half the number of patients of Linwood. Though the Respondent’s “duplication” argument has some logical appeal, it is clear from these facts that such was not the motivating reason for closing Linwood.

#### *b. Failure to rehire DeFeo*

Though alleged as a separate violation of the Act, the Respondent’s failure to rehire DeFeo is intertwined with the decision to close Linwood and terminate her. Nevertheless, if it could be found that the closure of Linwood was lawful, the Respondent’s refusal to offer her another job was clearly violative of Section 8(a)(3). DeFeo was known to be the leader of the union movement and Bush, at least, stated that he “would get rid of her.”

Much of the record, and the Respondent’s defense, is devoted to the legalistic argument that DeFeo did not file out the right kind of application nor did she put the job title and number on the application she did file. True enough her application was technically deficient, and she should have filed an internal application rather than one for nonemployees, had she been seeking a voluntary transfer. It may even be, as the Respondent argues, that these rules are mandated by an agreement with the Office of Federal Contract Compliance and Programs. However, the rules relied on by the Respondent, contained in “Job Posting Procedures” do not state any kind of a procedure to be used in transferring employees in the event a port is closed. Indeed, Graczyk testified without contradiction that facilities were closed and phlebotomists were moved to other facilities.

Further, had the Respondent not been disposed to terminate DeFeo, certainly she would have been given some initial aid in obtaining another job. And undisputedly, the Respondent had jobs available for which DeFeo was qualified. The subsequent

<sup>2</sup> The doctor had in fact approached Steinberg in late 1996 and Steinberg had written to the Respondent, which was addressed to DeFeo at the Linwood address. Bush told Steinberg he did not receive this communication. What happened to it was not pursued.

responses to her inquires by Novak cannot be characterized as any kind of an effort to help her obtain employment. If the closing of Linwood and the layoff of DeFeo had in fact been for purely business reasons, I believe she would have been offered another job and would have been instructed in how to file the appropriate application, if in fact such was needed. I simply do not accept the Respondent's statements and argument to the contrary. I reject the motive offered by the Respondent, and I infer the unlawful motive which it sought to hide by this argument. *Sattuck Denn Mining Corp.*, 362 F.2d 466 (9th Cir. 1966).

#### REMEDY

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend that it cease and desist

therefrom and take certain affirmative action designed to effectuate the policies of the Act, including reinstating Anne DeFeo her former job, or if that job no longer exists, to a substantially identical position of employment and make her whole for any loss of wages or other benefits she may have suffered in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Inasmuch as DeFeo was the only employee at the Linwood facility, I shall not recommend that the Respondent be ordered to reopen it. The purposes of the Act will be fully remedied by ordering the Respondent to reinstate her to an equivalent job in the immediate area of the Linwood facility.

[Recommended Order omitted from publication.]